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November 15, 2007

Thomasenia P. Duncan, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Ms. Duncan:

This letter constitutes a request for an advisory opinion on behalf of our client, People for Pete Domenici (the "Campaign"), the principal campaign committee of Senator Domenici, regarding whether it is permissible for the Campaign to pay legal fees and expenses incurred by Senator Domenici associated with a preliminary inquiry by the Senate Select Committee on Ethics ("Select Committee") into the Senator's conduct as a member of the United States Senate and any attendant proceedings. We also request an advisory opinion regarding the payment of legal expenses incurred by the Senator's staff as a result of the Select Committee's investigation into the Senator's official conduct and any attendant proceedings.

Factual Background

Citizens for Responsibility and Ethics in Washington ("CREW") filed a complaint with the Select Committee on March 5, 2007 (attached as Exhibit A). The complaint alleged that Senator Domenici violated Rule 43 of the Senate's Code of Conduct ("Code") when he telephoned David Iglesias, who was then the United States Attorney

for the District of New Mexico, to inquire about the status of a public corruption investigation of concern to the people of New Mexico. The complaint further contends that Senator Domenici engaged in "improper conduct," as that phrase is used by the Code, when he denied to a reporter Mr. Iglesias' allegation that the Senator attempted to pressure the U.S. Attorney to file charges in the corruption case before the November 2006 election. Upon receipt of the CREW complaint, the Select Committee initiated a preliminary inquiry into the allegations against Senator Domenici.

While the Select Committee's investigation, and any attendant proceedings, are confidential, they are clearly and directly related to Senator Domenici's conduct as a member of the United States Senate. Senator Domenici contacted Mr. Iglesias to obtain information regarding the status of a widely-reported public corruption investigation of concern to the Senator's constituents, and the Select Committee's inquiry is focused on alleged violations of the Senate Ethics Rules. Accordingly, Senator Domenici seeks guidance regarding whether it is permissible for the Campaign Committee to pay legal fees and expenses incurred in connection with the Select Committee's preliminary inquiry, as well as any legal fees and expenses that may be incurred as a result of further or additional inquiries related to the same operative facts.

Legal Framework

The FEC has long held that "candidates have wide discretion over the use of campaign funds." Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995). Thus, a federal officeholder may use campaign funds to pay any expense which would not constitute a personal use. 2 U.S.C. 439a, 11 C.F.R. 113.1(g)(1)(ii)(A), Advisory Opinion 2003-17. An officeholder satisfies this requirement if he "can reasonably show that the expenses at issue resulted from campaign or officeholder activities." Explanation and Justification at 7867. Put differently, such expenses may be paid from campaign funds if they would not "exist irrespective of the candidate's campaign." 11 C.F.R. 113.1(g). Accordingly, the FEC has held that legal expenses in defense of government investigations relating directly to a federal officeholder's acts in that role may be paid for with campaign funds. *See* Advisory Opinion 2006-35 ("legal expenses related to [a] House Ethics Committee inquiry are ordinary and necessary expenses incurred in connection with [a Representative's] duties as a Member of the House of Representatives."); *see also* Advisory Opinions 2003-17; 2000-40; 1998-1; 1997-12, 1996-24; and 1995-23.

The FEC has also permitted federal officeholders to use campaign committee funds to respond to media allegations of improper official activities. *See* Advisory Opinions 2006-35; 1998-1. In so doing, the FEC has recognized that, because the activities of officeholders may receive heightened scrutiny and media attention, expenses for legal services in connection with media inquiries are not personal expenditures. Advisory Opinion 1998-1 ("any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because [the person is] a candidate or federal officeholder").

The same rationale ought to apply to legal expenses incurred by members of the Senator's staff in connection with the Select Committee's investigation and any attendant proceedings. First, the Senate Ethics Manual expressly approves of use of a Senator's campaign funds in this way: "[a] Member may use [a legal expense trust or campaign funds] to pay his or her own expenses in connection with the legal matter, as well as those of his or her staff." Senate Ethics Manual at 116. Moreover, the Commission has approved the use of campaign funds to cover legal expenses incurred by persons other than a candidate or officeholder where those expenses resulted from a federal election or the performance of official duties. *See, e.g.*, Advisory Opinion 1996-24 (permitting use of a Representative's campaign funds to refute charges lodged against the Representative's wife during an election campaign). This is unsurprising, as the FEC has generally permitted the use of campaign funds for "ordinary and necessary expenses incurred in connection with" a Representative or Senator's official duties. Advisory Opinion 2006-35 at 3. Here, the Senator's staff incurred legal expenses in preparation for and defense of depositions authorized and conducted by the Select Committee as part of its investigation into Senator Domenici. Thus, payment of these expenses from the Senator's campaign funds would not constitute "personal use" of the funds, as the staff's legal expenses would not "exist irrespective of" the Senator's official conduct. 11 C.F.R. 113.1(g). Rather, these are "ordinary and necessary expenses" incurred in responding to the Select Committee's investigation of the Senator. Advisory Opinion 2006-35 at 3.

Based upon the foregoing, we ask the Commission to confirm that the Campaign may pay legal fees and expenses incurred by Senator Domenici associated with a preliminary inquiry by the Senate Select Committee on Ethics ("Select Committee") into the Senator's conduct as a member of the United States Senate and any attendant proceedings. We also ask the Commission to confirm that the Campaign may pay legal fees incurred by the Senator's staff as a result of the Select Committee's investigation into the Senator's official conduct and any attendant proceedings.

Please do not hesitate to contact us should you have questions about this matter.

Respectfully,



Donald F. McGahn II
Elliot S. Berke
Counsel, People for Pete Domenici

CREW | citizens for responsibility and ethics in washington

March 5, 2007

The Honorable Barbara Boxer, Chair
The Honorable John Cornyn, Vice Chair
Select Committee on Ethics
U.S. Senate
Room 220 Senate Hart Office Building
Washington, D.C. 20530

BY FAX: 224-7416

Re: Request for Investigation into Senator Pete V. Domenici

Dear Chair Boxer and Vice Chair Cornyn:

Citizens for Responsibility and Ethics in Washington, a non-profit, non-partisan organization, respectfully requests that you begin an investigation into Senator Pete V. Domenici's (R-NM) likely violation of Senate Rule 43.

According to *The Washington Post*, Sen. Domenici has acknowledged that he contacted the U.S. Attorney in Albuquerque, New Mexico, David C. Iglesias, to inquire about an ongoing corruption probe of Democrats. Dan Eggen, Domenici Says He Contacted Prosecutor, *The Washington Post*, March 5, 2007 (attached as Exhibit A). Mr. Iglesias previously stated that in mid-October, he was pressured about the pace of the investigation by two New Mexico lawmakers. *Id.* Initially, when asked about Mr. Iglesias's allegations, Sen. Domenici stated, "I have no idea what he's talking about." *Id.* Apparently, Rep. Heather Wilson (R-NM) first called Mr. Iglesias and Sen. Domenici called a week later. *Id.* Sen. Domenici has now admitted that he called Mr. Iglesias, stating "I asked Mr. Iglesias if he could tell me what was going on in that investigation and give me an idea of what time frame we were looking at." *Id.*

The Senate Ethics Manual states that:

The general advice of the Ethics Committee concerning pending court actions is that Senate offices should refrain from intervening in such legal actions . . . until the matter has reached a resolution in the courts. The principle behind such advice is that the judicial system is the appropriate forum for the resolution of legal disputes and, therefore, the system should be allowed to function without interference from outside sources.

Senate Ethics Manual, p. 178. The manual continues:

[T]he Committee has ruled that communications with an agency with respect to a matter which may be the subject of litigation in court is, nevertheless, generally permitted, where the communication is with the agency (or its attorneys, e.g. the Department of Justice) and not directed at the court, where the agency is not engaged in an on-going enforcement, investigative, or other quasi-judicial

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Honorable Barbara Boxer
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proceeding with respect to the matter, and where the communication is based on public policy considerations and is otherwise consistent with Rule 43.

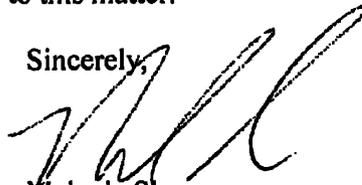
Senate Ethics Manual, p. 179.

Here, by pressuring Mr. Iglesias to act quickly on a pending corruption investigation, Sen. Domenici attempted to intervene in a pending legal action before the matter reached a resolution in the courts. Moreover, the communication with Mr. Iglesias appears to have been based on political considerations, *i.e.*, Sen. Domenici made the telephone call in October 2006 in an apparent attempt to influence Mr. Iglesias to take action that might have adversely affected Democrats in the November elections. These actions clearly violate Senate Rule 43.

In addition, when first confronted about having improperly contacted the U.S. Attorney about a pending criminal investigation, Sen. Domenici denied the allegations. The Senate Ethics Manual provides that “[c]ertain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation. Such conduct has been characterized as ‘improper conduct which may reflect upon the Senate.’”¹ This rule is intended to protect the integrity and reputation of the Senate as a whole.² The Ethics Manual explains that “improper conduct” is given meaning by considering “generally accepted standards of conduct, the letter and spirit of laws and Rules. . .”³ When Sen. Domenici stated, in response to Mr. Iglesias’s allegations, “I have no idea what he’s talking about,” he was obviously not telling the truth. This represents improper conduct that reflects upon the Senate.

Thank you for your attention to this matter.

Sincerely,



Melanie Sloan
Executive Director

Encl.

¹ *Improper Conduct Reflecting Upon the Senate and General Principles of Public Service*, Senate Ethics Manual, Appendix E, p. 432.

² *Id.*

³ *Id.* at 433; *see also* fn. 10 citing a 1964 investigation into the activities of Bobby Baker, then Secretary to the Majority of the Senate, the Committee on Rules and Administration, which stated, “It is possible for anyone to follow the ‘letter of the law’ and avoid being indicted for a criminal act, but in the case of employees of the Senate, they are expected, and rightly so, to follow not only the ‘letter’ but also the ‘spirit’ of the law.” S. Rep. No. 1175, 88th Cong., 2d Sess. 5 (1964).

EXHIBIT A

washingtonpost.com

Domenici Says He Contacted Prosecutor

By Dan Eggen
Washington Post Staff Writer
Monday, March 5, 2007; A01

Sen. Pete V. Domenici (R-N.M.) acknowledged yesterday that he contacted the U.S. attorney in Albuquerque last year to ask about an ongoing corruption probe of Democrats, but said he "never pressured him nor threatened him in any way."

Domenici also said in a statement that he told the Justice Department it should replace U.S. Attorney David C. Iglesias, one of eight federal prosecutors fired in December. But Domenici said the recommendation came before his call to Iglesias about the criminal investigation.

"In retrospect, I regret making that call and I apologize," Domenici said of talking to Iglesias. "However, at no time in that conversation or any other conversation with Mr. Iglesias did I ever tell him what course of action I thought he should take on any legal matter. I have never pressured him nor threatened him in any way."

Legal experts say it violates congressional ethics rules for a senator or House member to communicate with a federal prosecutor regarding an ongoing criminal investigation.

Domenici's remarks came four days after Iglesias alleged that two New Mexico lawmakers called him in mid-October and pressured him about the pace of the investigation. Iglesias said he believes the calls were at the root of his dismissal.

When asked last week about Iglesias's allegations, Domenici said: "I have no idea what he's talking about."

Rep. Heather A. Wilson (R-N.M.) has yet to comment; the rest of the New Mexico congressional delegation has denied placing any calls to Iglesias.

Two sources with knowledge of the calls have said Wilson made the first contact, followed by Domenici about a week later. The sources spoke on the condition of anonymity because they did not want to be named discussing the matter before a congressional hearing tomorrow.

The Justice Department said last night that Domenici called Deputy Attorney General Paul J. McNulty during the first week of October to discuss Iglesias.

This followed three calls to Attorney General Alberto R. Gonzales in September 2005, January 2006 and April 2006 during which, Justice Department spokesman Brian Roehrkas said, Domenici "expressed general concerns about the performance of U.S. Attorney Iglesias and questioned whether he was up to the job . . .

"At no time in those calls did the senator mention this corruption case," nor did he specifically ask for Iglesias's ouster, Roehrkas said.

The spokesman said he is not aware of any similar calls or complaints to the Justice Department from Wilson.

Iglesias and five other fired prosecutors are scheduled to testify tomorrow before Congress. Iglesias declined to

comment in detail yesterday on Domenici's statement, saying he was refraining from further public remarks before the hearings.

"As to Senator Domenici's apology, I accept it and look forward to testifying on Tuesday," he said in an e-mail message.

The Senate Ethics Manual advises senators that contact with prosecutors and regulatory agency officials is "generally permitted, where the communication is with the agency and not directed at the court, where the agency is not engaged in an ongoing enforcement, investigative or other quasi-judicial proceeding."

Stanley Brand, an ethics lawyer who served as House counsel in the 1980s, said a senator should contact a federal prosecutor about an ongoing investigation only if he or she has evidence or information related to the probe.

"It's going to precipitate a huge problem," Brand said, warning of a potential review by the Justice Department.

Staff members on the Senate Ethics Committee could not be reached to comment yesterday.

The firings, which had already sparked congressional interest, became more controversial last week with Iglesias's allegations of political interference.

Democrats allege that the Justice Department was sacking qualified prosecutors to reward political cronies, and they have proposed legislation to limit Gonzales's power to appoint interim replacements.

Administration officials acknowledged Friday that the White House approved the unusual firings, in which seven of the prosecutors were called Dec. 7 and asked to resign, even though most had positive job reviews. An eighth prosecutor, in Arkansas, was informed of his firing earlier, opening the job for a former aide to presidential adviser Karl Rove.

Domenici said in his statement that he called Iglesias to ask about a criminal probe of courthouse construction kickbacks, which the FBI had turned over to Iglesias's office. Officials say the probe centers on a former Democratic state senator; no charges have been filed in the case.

"I asked Mr. Iglesias if he could tell me what was going on in that investigation and give me an idea of what time frame we were looking at," Domenici said. "It was a very brief conversation, which concluded when I was told that the courthouse investigation would be continuing for a lengthy period."

Domenici is not specific about when the call took place, saying only that he made it "late last year." Iglesias said the calls occurred in mid-October.

At that time, Wilson, a close Domenici ally, was locked in a tight reelection battle with state Attorney General Patricia Madrid (D). Their race included widespread discussion of alleged corruption among New Mexico Democrats.

Domenici said his unhappiness with Iglesias began before he inquired about the probe of Democrats. He said he was concerned about resource problems in the U.S. attorney's office and "an inability within the office to move more quickly on cases."

"This ongoing dialogue and experience led me, several months before my call with Mr. Iglesias, to conclude and recommend to the Department of Justice that New Mexico needed a new United States attorney," Domenici said.

Justice officials have said they were never notified that lawmakers had called Iglesias and have said the issue

did not play a role in his firing. Iglesias has acknowledged he erred by not informing Washington officials about the calls, as Justice rules require.

The House Judiciary subcommittee has issued subpoenas for Iglesias, Bud Cummins of Little Rock, Carol Lam of San Diego and John McKay of Seattle. The Senate Judiciary Committee has also asked Daniel Bogden of Las Vegas and Paul K. Charlton of Phoenix to testify, in addition to the four others.

"No one believes anymore these U.S. attorneys were fired for any good reason," said Charles E. Schumer (D-N.Y.), a member of the Senate Judiciary Committee, "and we will start to uncover the real truth at our hearing on Tuesday."

In a related matter, administration officials said they were mistaken in saying that McNulty consulted his predecessor, James B. Comey, about some of the U.S. attorneys before they were fired. Comey was not consulted, the officials said.

Staff writer John Solomon and washingtonpost.com staff writer Paul Kane contributed to this report.

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